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Divorces Obtained Abroad By American Domiciliaries — Recognition in the United States

I. MIGRATORY DIVORCES IN GENERAL

The jurisdictional basis for a divorce decree in the United States is domicile.¹ The divorcing party must establish domicile in the rendering forum or the decree will be void for want of jurisdiction,² and may be collaterally attacked in another forum,³ the second forum applying its own domiciliary concepts.⁴ Thus, when a spouse leaves his home forum and obtains a migratory divorce in another jurisdiction, the domicile issue necessarily underlies any later attack. The judgments of a sister-state and those of a foreign country must be considered separately; the sister-state judgments being recognized on the basis of full faith and credit⁵ and those of a foreign country on the basis of comity.⁶

The two cases of *Williams v. North Carolina*⁷ established the modern approach to recognition of sister-state divorces. Since valid sister-state judgments are to be accorded full faith and credit, the first *Williams* case⁸ held that an *ex parte* divorce obtained in the domiciliary state of the divorcing spouse must be recognized by the reviewing forum; under the second *Williams* decision,⁹ the reviewing forum may determine whether or not there was a bona fide acquisition of

¹ EHRENZWEIG, CONFLICT OF LAWS 239 (1962); Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193, 208 (1951); Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775 (1955). For purposes of this discussion, the requisite of domicile may be considered to be physical presence (although not necessarily continuous) and intent to remain indefinitely within the state claimed as the domicile. For further discussion see Tweed and Sargent, *Death and Taxes are Certain—But What of Domicile*, 53 HARV. L. REV. 68 (1939). American courts had early recognized that the spouses might acquire separate domicile to which the marital res was taken: *Atherton v. Atherton*, 181 U.S. 155 (1901). The decision of *Haddock v. Haddock*, 201 U.S. 562 (1906), however, caused confusion in the application of the domicile rule, the Court holding that the guilty spouse (an abandoning husband) could not cause his later acquired domicile to become the situs of the marital res; seemingly only the innocent spouse could carry the marriage res. See Beale, *Haddock Revisited*, 39 HARV. L. REV. 417 (1926); Holt, *Any More Light on Haddock v. Haddock? The Problem of Domicile in Divorce*, 39 MICH. L. REV. 689 (1941).

² *Williams v. North Carolina*, 325 U.S. 226 (1945); *Williams v. North Carolina*, 317 U.S. 287 (1942); EHRENZWEIG, CONFLICT OF LAWS 242 (1962); GOODRICH, CONFLICT OF LAWS 49 (4th ed. 1964); 27A C.J.S. *Divorce* §§ 169c, 173 (1959).

³ *Rice v. Rice*, 336 U.S. 674 (1949); *Esenwein v. Esenwein*, 325 U.S. 279 (1944); *Williams v. North Carolina*, 325 U.S. 226 (1945); 27B C.J.S. *Divorce* §§ 356, 358 (1959).

⁴ *Williams v. North Carolina*, 325 U.S. 226 (1945); GOODRICH, CONFLICT OF LAWS 26 (4th ed. 1964).

⁵ U.S. CONST. art. IV, § 1; EHRENZWEIG, CONFLICT OF LAWS 47, 166 (1962); 16 AM. JUR. *Constitutional Law* § 585 (1938).

⁶ See *infra* note 14.

⁷ 325 U.S. 226 (1945); *Williams v. North Carolina*, 317 U.S. 287 (1942).

⁸ *Williams v. North Carolina*, 317 U.S. 287 (1942).

⁹ *Williams v. North Carolina*, 325 U.S. 226 (1945).

domicile. These decisions represented a "shift from matrimonial domicile to domicile in fact of one of the spouses."¹⁰ The United States Supreme Court subsequently determined in *Sherrer v. Sherrer*¹¹ that when the jurisdictional fact of domicile had already been litigated the doctrine of res judicata precluded the defendant who appeared in the divorce proceeding from collaterally attacking the judgment. In *Coe v. Coe*¹² res judicata again precluded the defendant spouse from attacking the bona fides of the domicile where the defendant had appeared in the suit, but had failed to raise the jurisdictional issue. Because of the full faith and credit requirement, *Jobson v. Muelberger*¹³ held that if the law of the divorcing forum precluded a third party from collaterally attacking a decree obtained by both parties to the divorce, the law of the divorcing forum controlled.

Judgments of foreign countries (hereinafter referred to as foreign judgments, as distinct from sister-state judgments) are recognized on the basis of comity.¹⁴ Comity, however, need not be extended to the foreign judgment. The reviewing court may consider the judgment violative of the reviewing forum's public policy.¹⁵ State courts did not begin to deal with the problem of the migratory divorce, either foreign or domestic, until the 1930's.¹⁶ The earliest decisions

¹⁰ Stumberg, *The Migratory Divorce*, 33 WASH. L. REV. 331, 334 (1958).

¹¹ *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

¹² 334 U.S. 378 (1948).

¹³ 340 U.S. 581 (1951).

¹⁴ Although comity is "a word of loose and uncertain meaning at best" (Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783, 784 (1950)), it may be synthesized as a court's voluntary recognition of another country's judicial decree, on the basis of courtesy or mutual convenience. See also *Bobala v. Bobala*, 68 Ohio App. 63, 71, 33 N.E.2d 845, 849 (1940); BLACK, LAW DICTIONARY 334 (4th ed. 1951); 16 AM. JUR. *Conflict of Laws*, § 5 (1938); EHRENZWEIG, *CONFLICT OF LAWS* 192 (1962); 16 AM. JUR. *Conflict of Laws*, §§ 4-7 (1938); 15 C.J.S. *Conflict of Laws*, § 3 (1939); Annot., 87 A.L.R. 973 (1933); Annot., 50 A.L.R. 30 (1927).

¹⁵ Public policy was defined in *In re Fleischer's Estate*, 192 Misc. 777, 80 N.Y.S.2d 543, 547 (1948) as "the laws of the state, whether found in the Constitution, the statutes or judicial records." See also *Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 130 N.E.2d 902 (1955); EHRENZWEIG, *CONFLICT OF LAWS* 202 (1962); Reese, *The Status in This Country of Judgments Rendered Abroad*, 50 COLUM. L. REV. 783 (1950); Note, 29 ALBANY L. REV. 328 (1965); Note, 21 ALBANY L. REV. 64 (1957); 16 AM. JUR. *Conflict of Laws* § 6 (1938).

¹⁶ In 1935, Duke University published a series of articles dealing with the problem of migratory divorce, 2 LAW & CONTEMP. PROB. 289-400 (1935), the Foreword to which reads:

With the nation's attention absorbed since 1929 by the stress of economic depression and the measures designed to combat it, the pronounced increase in volume of migratory divorce for which the facilitating legislation in Nevada, Arkansas, Idaho, and lately Florida, stands responsible, has aroused no organized protest. Even the Mexican "mail order" divorce business has until recently stimulated no efforts at restriction.

It was not until the late 1920's that a few state legislatures reduced their residence requirements and thereby facilitated the so-called "quickie" divorce. See Stumberg, *The Migratory Divorce*, 33 WASH. L. REV. 331, 334 (1958). Today the following states have a six weeks' residence requirement: FLA. STAT. ANN. § 1 (1957); IDAHO CODE ANN. § 32-701 (1947); NEV. REV. STAT. § 125.020 (1957). Arkansas and Wyoming have a sixty-day requirement, ARK. STAT. ANN. § 34-1208 (1962); WYO. STAT. ANN. § 20-48 (1957).

concerned migratory divorce decrees rendered by foreign countries. At this time, however, the courts did not yet have the *Sherrer*¹⁷ and *Coe*¹⁸ line of cases as a juridical frame of reference.¹⁹

II. THE FOREIGN MIGRATORY DIVORCE

The divorces granted by a foreign country may be put into four classifications:²⁰ (1) A divorce decree based on the divorcing spouse's bona fide domicile in the divorcing forum; (2) the mail order divorce; (3) the ex parte divorce; and (4) the bilateral divorce.

Before discussing these various classifications of decrees it should be noted that even where a divorce decree might otherwise be held invalid, the theory of estoppel may apply.²¹ This is true not only with respect to the various categories of foreign-acquired decrees, but also with respect to those acquired in a sister state.²²

A. Divorce Based On Bona Fide Domicile

If a bona fide domicile has been established in the divorcing forum,

¹⁷ *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

¹⁸ *Coe v. Coe*, 334 U.S. 378 (1948).

¹⁹ When the state courts in the 1930's began to review the foreign divorce decrees, they did so by applying the jurisdictional standards and judicial thinking of the times. Had *Sherrer* and *Coe* already been determined, the courts would at least have had available the doctrines which these cases formulated.

²⁰ There seems to be several approaches to the categorical breakdown of Mexican divorces. In Note, 17 S.C.L. REV. 625 (1965) the decrees are broken down into three categories: mail-order decree, *ex parte* decree, and bilateral divorce decree; Note, 33 FORDHAM L. REV. 449 (1965) seems to deal with the problem along the lines of division into three categories; Note, 45 MASS. L.Q. No. 3142 (1960) lists five categories of decrees: mail-order decree; the decree given where the plaintiff personally appears and the defendant is personally served within the Mexican jurisdiction; the decree where the plaintiff appears personally and the defendant by attorney; the decree issued where the defendant appears personally and plaintiff appears by Mexican attorney; and finally, the *ex parte* decree; and in Note 21 ALBANY L. REV. 64, 73 (1957) four categories are considered: mail-order decrees; decrees where both parties were physically present; decrees where one party was physically present and one was present by attorney; and *ex parte* decrees.

²¹ The equitable principle of estoppel will apply to preclude the divorcing spouse from later attacking the divorce. Estoppel applied to *ex parte* divorces: *Dunn v. Tiernan*, 284 S.W.2d 754 (Tex. Civ. App. 1955) *error ref. n.r.e.*, though it is not altogether clear whether the Texas court would hold the bilateral foreign decree invalid; *Spellens v. Spellens*, 49 Cal.2d 210, 317 P.2d 613 (1957). Estoppel applied to mail order divorces: *Sears v. Sears*, 293 F.2d 884 (D.C. Cir. 1961); *Schotte v. Schotte*, 21 Cal. Rep. 2d 220 (1962); *Hensgen v. Silberman*, 87 Cal. App. 2d 668, 197 P.2d 356 (1948); *Harlan v. Harlan*, 70 Cal. App. 2d 657, 161 P.2d 490 (1945); *Considine v. Rawl*, 39 Misc. 2d 1021, 242 N.Y.S.2d 456 (1963); *Weber v. Weber*, 135 Misc. 717, 238 N.Y.S. 333 (1929). New York, however, will not permit estoppel to be applied to a mail order decree where the parties are simply seeking to have the marital status adjudicated and are not seeking property or other enrichment, *Dorn v. Dorn*, 122 Misc. 1057, 112 N.Y.S.2d 90 (1952), *aff'd*, 282 App. Div. 597, 126 N.Y.S.2d 713 (1953); *Krause v. Krause*, 282 N.Y. 355, 26 N.E.2d 290 (1941).

²² *Harper, The Myth of the Void Divorce*, 2 LAW & CONTEMP. PROB. 335 (1935); *Harper, The Validity of Void Divorces*, 79 U. PA. L. REV. 158 (1930); *Stumberg, The Migratory Divorce*, 33 WASH. L. REV. 331 (1958).

the divorce will generally be recognized as valid.²³ The burden is on the attacking party to defeat the allegation of jurisdiction.²⁴ California statutorily makes the burden of proving lack of domicile more difficult if the foreign decree recites that a bona fide domicile was established.²⁵ But, due to the fact that California also has the Uniform Divorce Recognition Act,²⁶ the divorcing spouse will not have the advantage of this provision if he resided in California immediately before or after the decree.

B. Mail Order Divorce

The mail order divorce decree is obtained completely by correspondence—neither spouse appearing before the foreign court, either personally or by attorney.²⁷ No state will recognize the mail order decrees; they are considered violations of state public policy.²⁸

²³ *Scott v. Scott*, 51 Cal. Rep. 2d 249, 331 P.2d 641 (1958); *De Young v. De Young*, 27 Cal. Rep. 2d 521, 165 P.2d 457 (1946); *Pawley v. Pawley*, 46 So.2d 464 (Fla. 1950), cert. denied, 340 U.S. 866 (1950); *Kapigan v. Der Minassian*, 212 Mass. Rep. 412, 99 N.E. 264 (1912).

²⁴ *Ryder v. Ryder*, 2 Cal. App.2d 426, 37 P.2d 1069 (1935); *Davis v. Davis*, 156 N.E.2d 494 (Ohio 1959); *Thompson v. Yarnell*, 313 Pa. 244, 169 A. 370 (1933).

²⁵ CAL. CIV. CODE § 1915 (1959):

A final judgment of any other tribunal of a foreign country having jurisdiction according to the laws of such country to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this State.

See also *De Young v. De Young*, 27 Cal. Rep. 2d 521, 165 P.2d 457 (1946); *Ryder v. Ryder*, 2 Cal. App. 2d 426, 37 P.2d 1069 (1935); *Galloway v. Galloway*, 116 Cal. App. 2d 478 (1931).

²⁶ CAL. CIV. CODE, §§ 150-1-150.2 (1959):

150.1 A divorce obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriage were domiciled in this State at the time the proceeding for the divorce was commenced.

150.2 Proof that a person hereafter obtaining a divorce from the bonds of matrimony in another jurisdiction was (a) domiciled in this State within twelve months prior to the commencement of the proceeding therefor, and resumed residence in this State within eighteen months after the date of his departure from this State and until his return maintained a place of residence within this State, shall be prima facie evidence that the person was domiciled in this State when the divorce proceeding was commenced.

²⁷ Although a foreign lawyer may handle the details within the divorcing forum, this is not tantamount to an appearance by either party.

²⁸ *Sears v. Sears*, 293 F.2d 884 (D.C. Cir. 1961); *U.S. v. Snyder*, 177 F.2d 44 (D.C. Cir. 1949); *Sherman v. Fed. Sec. Agency*, 166 F.2d 451 (3d Cir. 1948); *Muir v. United States*, 93 F. Supp. 939 (N.D. Cal. 1950); *Petition of R.*, 56 F. Supp. 969 (D. Mass. 1944); *Petition of Taffel*, 49 F. Supp. 109 (S.D.N.Y. 1941); *Rudnick v. Rudnick*, 131 Cal. Rep. 2d 227, 280 P.2d 96 (1955); *Harlan v. Harlan*, 70 Cal. App. 2d 657, 161 P.2d 490 (1945); *Kegley v. Kegley*, 16 Cal. App. 2d 216, 60 P.2d 482 (1936); *Bergeron v. Bergeron*, 287 Mass. Rep. 524, 192 N.E. 86 (1934); *State v. De Meo*, 35 N.J. Super. 168, 113 A.2d 688 (1955), *aff'd* 20 N.J. Rep. 1, 118 A.2d 1 (1955); *Antunes v. Antunes*, 23 N.J. Super. 150, 92 A.2d 653 (1952); *State v. Najjar*, 1 N.J. Super. 208, 63 A.2d 807 (1949); *Tonti v. Chadwick*, 1 N.J. 531, 64 A.2d 436 (1949); *Greenspan v. Greenspan*, 19 N.J. Misc. 153, 18 A.2d 283 (1941); *Busk v. Busk*, 229 N.Y.S.2d 904 (1962); *Caldwell v. Caldwell*, 298 N.Y. 146, 81 N.E.2d 60 (1948); *Querze v. Querze*, 290 N.Y. 13, 47 N.E.2d 423 (1943); *Vose v. Vose*, 255 App. Div. 1012, 9 N.Y.S.2d 575 (1938), *aff'd*, 280 N.Y. 779, 21 N.E.2d 616 (1939); *Smith v. Smith*, 72 Ohio App. 213, 50 N.E.2d 889 (1943); *De Rosay v. De Rosay*, 162 Pa. Super. 333, 57 A.2d 685 (1948).

C. *Ex Parte Divorce*

When the divorcing spouse has failed, by the standards of the reviewing forum, to establish a bona fide domicile within the foreign forum and the defendant spouse has made no appearance in the suit, either personally or by attorney, the decree is *ex parte*. Such decrees violate the public policy of every state which has reviewed them, and the courts uniformly refuse to recognize them as valid.²⁹

D. *The Bilateral Divorce*

1. *General Approaches*

In the bilateral divorce both parties are before the court, either personally³⁰ or one personally and the other by attorney,³¹ and at least one of the parties has complied with the jurisdictional requirements of the foreign forum. Those few states (other than New York) which have considered the issue have refused to recognize the bilaterally acquired foreign divorce.³² Since the reviewing forum in the United States generally requires domicile as a jurisdictional basis for divorce, recognition of a decree where the divorcing spouse was within the rendering jurisdiction for only a day or so is considered to violate the reviewing state's public policy;³³ and some courts even consider it to be a fraud on the foreign court.³⁴

Although few states have directly passed on the issue of the bilateral foreign divorce decree, nine states³⁵ have adopted the Uniform

²⁹ *Harrison v. Harrison*, 214 F.2d 571 (4th Cir. 1954); *Hodge v. Hodge*, 80 F. Supp. 379 (D.D.C. 1948); *Wells v. Wells*, 230 Ala. 430, 161 So. 794 (1935); *Bethune v. Bethune*, 192 Ark. 811, 94 S.W.2d 1043 (1936); *Sohnlein v. Winchell*, 41 Cal. Rep. 145 (1964); *Bonner v. Reandrew*, 203 Iowa 1355, 214 N.W. 536 (1927); *Untermann v. Untermann*, 35 N.J. Super. 354, 114 A.2d 311 (1955), modified and *aff'd*, 19 N.J. 507, 117 A.2d 599 (1955); *Reik v. Reik*, 112 N.J. Eq. 234, 163 A. 907 (1933); *Newton v. Newton*, 13 N.J. Misc. 613, 179 A. 621 (1935); *Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 130 N.E.2d 902 (1955); *Weisserberger v. Weisserberger*, 206 Misc. 461, 133 N.Y.S.2d 439 (1954); *In re Andrew's Estate*, 132 N.Y.S.2d 571 (1954); *Kirk v. Kirk*, 238 P.2d 808 (Okla. 1951); *Allison v. Allison*, 151 Pa. Super. 369, 30 A.2d 365 (1943); *Turman v. Turman*, 99 S.W.2d 947 (Tex. Civ. App. 1936), *cert. denied*, 301 U.S. 698 (1937), although here the husband had fled from a Texas suit to Mexico and Texas had not relinquished its jurisdiction over the subject matter.

³⁰ *Warrender v. Warrender*, 79 N.J. Super. 114, 190 A.2d 684 (1963), *aff'd*, 42 N.J. 208, 200 A.2d 123 (1964); *Golden v. Golden*, 41 N.M. Rep. 356, 68 P.2d 928 (1937).

³¹ *Bobala v. Bobala*, 68 Ohio App. 63, 33 N.E.2d 845 (1940).

³² See notes 30 and 31 *supra*.

³³ *Ibid.*

³⁴ *Golden v. Golden*, 41 N.M. Rep. 356, 68 P.2d 928 (1937). This reasoning is also applied to the divorce where there is lack of domicile (*ex parte*), *e.g.*, *Sohnlein v. Winchell*, 41 Cal. Rep. 145 (1964); *Ryder v. Ryder*, 2 Cal. App. 2d 426, 37 P.2d 1069 (1938); *Galloway v. Galloway*, 116 Cal. App. 478, 2 P.2d 842 (1931); the mail order decree cases may also refer to fraud on the foreign court, *e.g.*, *Schotte v. Schotte*, 21 Cal. Rep. 220 (1962).

³⁵ CAL. CIV. CODE §§ 150.1-150.2 (1959); MONT. REV. CODE ANN. 21-150 (Supp. 1963); NEB. REV. STAT. ANN. 42-303 (1943); N.H. REV. STAT. ANN. 458:19-a (Supp. 1955); N.D. CENT. CODE ANN. 14-05-08.1 (1960); R.I. GEN. LAWS ANN. § 15-5-12 (Supp. 1961); S.C. CODE ANN. § 20-131-20-134 (1962); WASH. REV. CODE ANN. § 26.08.200 (1961), § 26.08.210 (1961); WIS. STAT. ANN. § 247.22 (1957).

Divorce Recognition Act,³⁶ which establishes such presumptions of domicile within the reviewing state as to impede a finding of jurisdiction in the foreign forum.³⁷ The mere enactment of this statute manifests disapproval of the bilateral foreign divorce.

Nonetheless, there appears to be a weakening of the domicile concept as a whole in some states. In *Wheat v. Wheat*,³⁸ the Supreme Court of Arkansas upheld a statute which provides for a three months' residency within the state as the jurisdictional basis for divorce. The court clearly stated:

With respect to the due process clause, as distinguished from the full faith and credit clause, we are not convinced that domicile must be the sole basis for the exercise of jurisdiction over the marriage relationship. . . . It has been pointed out repeatedly that the theory of basing divorce jurisdiction solely on domicile has led to conflicting decisions and to legal confusion ever since the theory was first formulated in connection with the full faith and credit clause. Domicile differs from residence only in the existence of a subjective intent to remain more or less permanently in the particular state. Whether that intent exists on the part of a person who comes to Arkansas can seldom be proved with any measure of certainty.³⁹

Arkansas has continued to follow this line of reasoning,⁴⁰ and one decision has been found which gave full faith and credit to such an Arkansas decision.⁴¹ Moreover, the *Wheat* case was used as the rationale for upholding a divorce granted to a serviceman who had resided in Arkansas for over three months.⁴² And Alaska took the *Wheat* approach in upholding its serviceman divorce statute.⁴³ Eleven states⁴⁴ have enacted a serviceman divorce statute, reducing the domiciliary requirements for servicemen stationed in the respective jurisdiction. Decisions in some of these states have acknowledged the inadequacy of rigid domicile prerequisites in the particular situation.⁴⁵ The effect of such statutes, however, is not altogether apparent, especially in view of the fact that Nebraska and Rhode Island have

³⁶ UNIFORM DIVORCE RECOGNITION ACT, 9A U.L.A. 461.

³⁷ See note 26 *supra* and accompanying text.

³⁸ 229 Ark. 842, 318 S.W.2d 793 (1958).

³⁹ *Id.* at 797.

⁴⁰ *Weaver v. Weaver*, 231 Ark. 341, 329 S.W.2d 422 (1959).

⁴¹ *Cummiskey v. Cummiskey*, 259 Minn. 427, 107 N.W.2d 864 (1961).

⁴² *Walther v. Walther*, 233 Ark. 191, 343 S.W.2d 408 (1961).

⁴³ *Lauterbeck v. Lauterbeck*, 392 P.2d 24 (Alaska 1964).

⁴⁴ ALASKA STAT. § 6-5-10 (Supp. 1959); CONN. GEN. STAT. REV. § 46-15 (1958); KAN. GEN. STAT. ANN. § 60-1603 (Supp. 1963); NEB. REV. STAT. § 42-341-42-344 (1943); N.M. STAT. ANN. § 22-7-4 (1953); N.C. GEN. STAT. § 50-18 (Supp. 1959); OKLA. STAT. ANN. tit. 12, § 1272 (1961); S.D. CODE § 14.0720 (1939); TEX. REV. STAT. ANN. art. 4631 (1960); VA. CODE ANN. § 20-97 (1950).

⁴⁵ *Craig v. Craig*, 143 Kan. 624, 56 P.2d 464 (1936); *Wallace v. Wallace*, 63 N.M. 414, 320 P.2d 1020 (1958); *Wood v. Wood*, 159 Tex. 350, 320 S.W.2d 807 (1959).

enacted both the Uniform Divorce Recognition Act⁴⁶ and a service-man divorce statute.⁴⁷

As to the states which have not yet made a definitive finding on the bilateral foreign divorce, decisions in at least two, Florida and Texas, may indicate a willingness to recognize the bilaterally acquired foreign divorce.⁴⁸

2. *The New York Approach*

New York is on the other side of the decisional fence in regard to the bilaterally obtained foreign divorce. As early as 1923, the New York court of appeals, applying New York law, recognized a French-granted divorce though neither of the spouses had established domicile in France.⁴⁹ Both parties had had substantial ties with the French jurisdiction, but the court of appeals did not decide the case on this ground. The decision appears to have established New York's policy of recognizing a foreign divorce decree without requiring that the divorcing spouse have acquired a domicile within the divorcing

⁴⁶ NEB. REV. STAT. § 42-34-42-344 (1943); R.I. GEN. LAWS ANN. § 15-5-12 (1956).

⁴⁷ NEB. REV. STAT. § 42-303 (1943); R.I. GEN. LAWS ANN. § 15-5-12 (1956). It was recently stated in Note, 16 HASTINGS L.J. 121 (1964), that except for a shift in the burden of proof, the Uniform Divorce Recognition Act in California has not brought about a result different from any which would have been brought about by California law. In view of the decisions of the state courts which have decided the issue of recognition of Mexican decrees, this conclusion may be said to apply to the other states which have enacted statutes similar to those of California.

⁴⁸ There seems to be a question as to the way the courts of Florida or Texas would rule if they squarely faced the issue of the bilateral foreign divorce. In *Willson v. Willson*, 55 So. 2d 905 (Fla. 1952) where the husband obtained a Canadian divorce and the wife's attorney was present, the Florida court found that the Canadian court had jurisdiction (on the grounds of domicile), yet the Florida court made the statement that: "As to matters actually litigated this court has repeatedly approved the doctrine that a valid decree of a foreign country will be recognized in this state." 55 So.2d 905, 906 (1952). What is a valid decree is not made clear, nor did the Florida court qualify its statement by further requiring domicile. In *Dunn v. Tiernan*, 284 S.W.2d 754 (Tex. Civ. App. 1955), *error ref. n.r.e.* the Texas court relied on the doctrine of estoppel to uphold the validity of a Mexican divorce. But found in the opinion is the following commentary:

Examination of the record reveals that appellant initiated the Juarez divorce and persuaded appellee to enter her appearance through a Juarez attorney. . . . Examination of the judgment itself shows that the Juarez court apparently had full jurisdiction to render the decree that it did, and we think the trial court was correct in holding appellant estopped from challenging the validity of the Juarez decree. To have permitted him so to do would in effect permit him to take advantage of his own fraud which he perpetrated on the Mexican courts.

284 S.W.2d 754, 756 (1955). California, on the other hand, in *ex parte* cases where there was no appearance (personal or by attorney of the defendant spouse), has stated that a residence not acquired in good faith does not confer jurisdiction on the divorcing court. See *Kegley v. Kegley*, 16 Cal. App. 2d 216, 60 P.2d 482 (1936); *Ryder v. Ryder*, 2 Cal. App. 2d 426, 37 P.2d 1069 (1935). Moreover, California has adopted the UNIFORM DIVORCE RECOGNITION ACT, making proof of domicile in another jurisdiction outside California more difficult; see note 26 *supra* and accompanying text.

⁴⁹ *Gould v. Gould*, 235 N.Y. 14, 138 N.E. 490 (1923).

forum.⁵⁰ Nonetheless, the decision was limited to "the circumstances of this case."⁵¹ The court of appeals stated:

If in the instant case the judgments of the courts in France disclosed that the parties were merely sojourning in France at the time the decree of divorce was granted, or that a residence in France was of such limited duration as to lead the Supreme Court to believe that the decree was the result of collusion, or the judgment was rendered for a cause not recognized as sufficient cause for absolute divorce by the law of this state, it may be that the justice presiding would be justified in holding that the decree was contrary to the policy of this state and in a refusal to give effect to the evidence sought to be established thereby. We leave those questions open.⁵²

In 1938, nine years prior to the determinations in *Sherrer v. Sherrer*⁵³ and *Coe v. Coe*⁵⁴ (that res judicata barred a spouse who had participated in litigation from later attacking the decree), the New York supreme court, special term, in *Leviton v. Leviton*⁵⁵ recognized a Mexican divorce decree where the divorcing spouse had appeared before the Mexican court and established his domicile as required by Mexican law,⁵⁶ his wife appearing by duly authorized attorney. The court held that recognition of the Mexican decree would not contravene New York public policy, "even where the ground, the domicile, or other prerequisites, singly or together, are found to be such that they would be held insufficient towards securing a New York decree after a trial taking place here."⁵⁷ The court's reason for this was that "establishment of a domicile or residence in the strict sense is a question both of intent and act. The parties acted; we must accept the Mexican court's conclusion upon their intent."⁵⁸ Thus New York refrained from applying its own domicile requirement to a foreign judgment, allowing the determination of domicile in the foreign forum to be conclusive.

During the next quarter of a century, the New York lower courts continued to recognize the validity of bilateral Mexican divorces⁵⁹

⁵⁰ *Rosenstiel v. Rosentiel*, 16 N.Y.2d 64, 262 N.Y.S.2d 86, 91 (1965).

⁵¹ *Gould v. Gould*, 235 N.Y. 14, 138 N.E. 490, 495 (1923).

⁵² *Id.* at 495.

⁵³ *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

⁵⁴ *Coe v. Coe*, 334 U.S. 378 (1948).

⁵⁵ *Leviton v. Leviton*, 6 N.Y.S.2d 535 (N.Y. 1938), *aff'd*, 254 App. Div. 670, 4 N.Y.S.2d 992 (1938).

⁵⁶ In discussing the Mexican divorce law, it is inaccurate to speak of Mexican divorce law as being one uniform throughout Mexico, since Mexico itself is comprised of a federation of states, each with its own rules for divorce. For further analysis see ALVAREZ, *THE DIVORCE LAWS OF MEXICO, Divorce in the Liberal Jurisdictions, Marriage and Divorce Symposium* (Albrecht ed. 1955); Summers, *Divorce Laws of Mexico*, 2 LAW & CONTEMP. PROB. 310 (1935). See also note 66 *infra*.

⁵⁷ *Leviton v. Leviton*, 255 App. Div. Rep. 230, 6 N.Y.S.2d 535, 537 (N.Y. 1938).

⁵⁸ *Ibid.*

⁵⁹ See note 79 *infra*.

though the highest court in the state, the court of appeals, did not rule on the matter.

In 1960, however, the so-called "New York Rule"⁶⁰ found itself to be on less certain ground than its history would indicate. The New York Supreme Court, Appellate Division, in *Heine v. Heine*,⁶¹ reversed a decision by the supreme court, special term,⁶² and held that a bilaterally obtained Mexican divorce (the wife having appeared personally before the court and the husband having appeared by attorney) was "of no more validity than a so-called mail-order divorce."⁶³ Although this decision was subsequently reversed,⁶⁴ the supreme court, special and trial term relied on it in *Wood v. Wood*⁶⁵ to deny recognition to another bilateral Mexican divorce decree. Whereas the divorcing spouse in *Heine* had proceeded under that article of Chihuahua law which establishes domicile, the present Mrs. Wood had proceeded under that article which grants jurisdiction to the court when the spouses submit to it.⁶⁶ The husband had appeared through duly authorized attorney. Mrs. Wood's present husband now attacked the validity of the decree; if invalid the present marriage would be void. The court in *Wood* held that: "Neither of these parties ever had even a colorable residence in Mexico and the divorce decree is patently invalid."⁶⁷ When *Heine* was finally reversed,⁶⁸ the

⁶⁰ EHRENZWEIG, CONFLICT OF LAWS 245 (1962).

⁶¹ 10 A.D.2d 864, 199 N.Y.S.2d 788 (1960).

⁶² *Heine v. Heine*, 190 N.Y.S.2d 742 (N.Y. 1959).

⁶³ *Heine v. Heine*, 10 A.D.2d 864, 199 N.Y.S.2d 788, 789 (1960).

⁶⁴ *Heine v. Heine*, 231 N.Y.S.2d 239 (N.Y. 1962), *aff'd*, 19 A.D.2d 695, 242 N.Y.S.2d 705 (1963).

⁶⁵ 245 N.Y.S.2d 800 (N.Y. 1963).

⁶⁶ In *Wood v. Wood*, 245 N.Y.S.2d 800, 805 (1963) the court sets out the applicable Chihuahua Law. Chihuahua courts assume jurisdiction to issue a divorce decree either where one of the parties shows proof of domicile in Chihuahua (obtained by signing the Municipal Register and bringing the certificate thereof into court) or where the parties submit themselves to the jurisdiction of the court, either expressly or impliedly (by filing of a complaint by plaintiff or by failure of defendant to object to the competence of the court). The applicable sections are as follows:

Art. 22: The judge competent to take cognizance of a contested divorce is the one of the place of residence of the plaintiff; and to take cognizance of the one by mutual consent, the one of the residence of either of the spouses.

Art. 23: Competence may also be fixed by express or tacit submission. Express submission exists when the parties concerned renounce clearly and conclusively that forum which the law accords to them, and designate with all precision the judge to whom they submit. Tacit submission exists by the fact that the plaintiff files his complaint, or by the fact that the defendant, after having been summoned in proper form does not timely raise the lack of competence, or after having raised it, desists therefrom.

Art. 24: Residence for purposes of Article 22 of the present law shall be proved by the respective certificates of the Municipal Register of the place.

⁶⁷ *Wood v. Wood*, 245 N.Y.S.2d 800, 810 (N.Y. 1963).

⁶⁸ *Heine v. Heine*, 231 N.Y.S.2d 239 (N.Y. 1962), *aff'd*, 19 A.D.2d 695, 242 N.Y.S.2d 705 (1963).

Wood case was reargued.⁶⁹ The court upheld its former decision, distinguishing the *Wood* case from *Heine* since: "the foreign court must have 'jurisdiction' as we understand that term and not as the foreign court understands it; and I repeat it is not the notice of appearance that confers jurisdiction."⁷⁰ Nonetheless, the supreme court, appellate division, reversed since there was "no valid difference of substance between this case and *Rosenstiel* . . . decided herewith."⁷¹

As in the *Wood* case, the present husband in *Rosenstiel v. Rosenstiel*⁷² attacked the validity of the Mexican divorce decree allegedly dissolving his wife's prior marriage. Mrs. Rosenstiel's former husband had complied with the Mexican domicile requirements of signing the municipal register and offering his citizen registration as proof of domicile when he personally petitioned the Mexican court for divorce.⁷³ The present Mrs. Rosenstiel had appeared through duly authorized attorney. The supreme court, special and trial term, held the divorce invalid.⁷⁴ The supreme court, appellate division reversed.⁷⁵ Both the *Wood* and *Rosenstiel* decisions were appealed.

III. *Rosenstiel v. Rosenstiel; Wood v. Wood*⁷⁶

The court of appeals did not differentiate between the Mexican jurisdictional requirements in *Rosenstiel* and *Wood*, but rather, held that "A balanced public policy now requires that recognition of the bilateral Mexican divorce be given rather than withheld and such recognition as a matter of comity offends no public policy of this state."⁷⁷ After taking a pragmatic view of today's "highly mobile era",⁷⁸ the court compared the Mexican divorce decree with one obtained in Nevada after a six weeks' stay and found no intrinsic difference between the two. Despite the full faith and credit requirement for the Nevada decree, one decree did not offend New York public policy any more than the other.

One of the reasons for the court's decision was

a long series of decisions over a period of a quarter of a century in the New York Supreme Court at the appellate division and at special term recognizing the validity of bilateral Mexican divorces which . . . has

⁶⁹ *Wood v. Wood*, 245 N.Y.S.2d 800 (N.Y. 1963).

⁷⁰ *Id.* at 821.

⁷¹ *Wood v. Wood*, 21 A.D.2d 627, 253 N.Y.S.2d 195, 205 (1963).

⁷² 43 Misc. 2d 462, 251 N.Y.S.2d 565 (1964); 21 A.D.2d 635, 253 N.Y.S.2d 206 (1964).

⁷³ See note 66 *supra*.

⁷⁴ *Rosenstiel v. Rosenstiel*, 43 Misc. 2d 462, 251 N.Y.S.2d 565 (1964).

⁷⁵ *Rosenstiel v. Rosenstiel*, 21 A.D.2d 635, 253 N.Y.S.2d 206 (1964).

⁷⁶ *Rosenstiel v. Rosenstiel; Wood v. Wood*, 16 N.Y.2d 64, 262 N.Y.S.2d 86 (1965).

⁷⁷ *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 262 N.Y.S.2d 86, 91 (1965).

⁷⁸ *Id.* at 89.

some relevancy to the question. . . . No New York decision has refused to recognize such a bilateral Mexican divorce.⁷⁹

Indeed, the problem of Mexican divorces is particularly acute in New York; the New York Times has estimated that 200,000 New Yorkers have obtained divorces from Mexican jurisdictions during these twenty-five years.⁸⁰ For this reason, both Chief Judge Desmond and Judge Scileppi, who quite strongly disapprove of the New York approach and would reverse, would give the reversal only a prospective application.⁸¹

The court of appeals also recognized that by statute New York will grant a divorce without requiring that the parties have established domicile within the state.⁸² If the spouses were originally married in New York or if the plaintiff spouse was a resident of New York at the time the offense was committed and a resident when he or she brings the suit for divorce, New York courts will entertain the suit.

The court of appeals seems also to have based its holding on the fact that New York's divorce law is grossly inadequate, allowing but one ground for divorce—adultery.⁸³ This legislative shortcoming is thus, in some measure, apparently being compensated for by liberal judicial interpretation.

IV. Conclusion

The United States Supreme Court has never declared that domicile is the *sine qua non* of divorce jurisdiction.⁸⁴ Until it does, the decisions of state courts must stand as authority for the treatment of migratory divorces.

When the law concerning foreign divorce decrees began to develop

⁷⁹ *Id.* at 88.

⁸⁰ N.Y. Times, Jul 8, 1964, p. 34, col. 2; cited in Note, 29 ALBANY L. REV. 328 (1965) and in Note, 33 FORDHAM L. REV. 449, 450 (1965).

⁸¹ Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 262 N.Y.S.2d 86, 92 and 102 (1965) (dissenting opinions).

⁸² Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 262 N.Y.S.2d 86, 90 (1965); see also N.Y. DOM. REL. LAW § 170 (1964).

⁸³ In Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 262 N.Y.S.2d 86, 89 (1965), the court rejects the argument against recognition of the decree merely because the grounds on which it was granted were not sufficient under New York law. The dissent however, 262 N.Y.S.2d at 101, takes issue with the majority, stating that: "The Legislature has seen fit to permit divorce in this State only because of the adultery of the defendant. . . . This is certainly indicative of a design to restrict the availability of divorce and in so doing preserve the family unit." See also N.Y. DOM. REL. LAWS § 170.

⁸⁴ In Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), although the issue of domicile as a jurisdictional requirement was raised, it was moot by the time it reached the Supreme Court and no decision was made on it. In Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955), the decision could have been made along these lines, but rested on other grounds. See also Note, 14 LA. L. REV. 893 (1954).

in the 1930's, the rules of domestic divorce law were not yet clarified,⁸⁵ and the courts, except for New York, applied the traditional jurisdictional standards in recognizing divorce decrees of foreign forums through comity. Indeed, this may have been the only logical approach at that time. But very shortly thereafter the domicile rule, as it was known, began to disintegrate, especially under the *Sherrer*⁸⁶ and *Coe*⁸⁷ line of decisions. Although these cases seemingly state the domicile requirement, they so effectively permit evasion of it that the need for establishing a domicile has become almost meaningless. There is thus a discrepancy today in the recognition given a sister-state divorce and that accorded a foreign decree; the *res judicata* principle which enables the divorcing parties to circumvent a true establishment of domicile in obtaining a "quickie"⁸⁸ sister-state divorce is not available in most states to those who obtain a foreign decree. Furthermore, since the 1930's the United States has undergone obvious economic and social changes. Her citizens are wealthier and more mobile.⁸⁹ Divorce rules based on a single domicile are even less applicable today than they were thirty or so years ago.⁹⁰

Although New Jersey as recently as 1964 refused to recognize a bilaterally granted Mexican divorce,⁹¹ and nine states have adopted the Uniform Divorce Recognition Act,⁹² thereby impeding recognition of a bilaterally acquired foreign decree, there may be a growing relaxation of the domicile requirements. Decisions in Florida and Texas⁹³ indicate that those states might recognize such decrees. *Wheat v. Wheat*⁹⁴ upheld an Arkansas divorce statute which predicates jurisdiction on residence, not domicile. A similar Arkansas decision was given full faith and credit,⁹⁵ and Alaska relied on *Wheat* when it upheld an Alaskan serviceman divorce statute.⁹⁶ The serviceman's divorce statutes enacted in eleven states⁹⁷ establish residence as the

⁸⁵ See notes 16-19 *supra* and accompanying text.

⁸⁶ *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

⁸⁷ *Coe v. Coe*, 334 U.S. 378 (1948).

⁸⁸ See Mr. Justice Frankfurter's dissent in *Sherrer v. Sherrer*, 334 U.S. 343, 363 (1948).

⁸⁹ See Statistical Abstract of U.S., pp. 32-33 (85th ed. 1964), which breaks down the mobility status of the population in 1962 and 1963 (as to population, non-movers and movers); it then compares the mobility status for the years 1950 and 1960, showing that figures in 1949 indicated 16,476 had a different house in the same county, 9,075 lived in a different county or abroad; in 1960, the figures were 47,387 and 29,801 respectively.

⁹⁰ See Tweed and Sargent, *Death and Taxes are Certain—But What of Domicile*, 53 HARV. L. REV. 68 (1939).

⁹¹ *Warrender v. Warrender*, 79 N.J. Super. 114, 190 A.2d 684 (1963), *aff'd*, 42 N.J. 287, 200 A.2d 123 (1964).

⁹² See notes 35-36 *supra* and accompanying text.

⁹³ See note 48 *supra*.

⁹⁴ 229 Ark. 842, 318 S.W.2d 793 (1958).

⁹⁵ *Cummiskey v. Cummiskey*, 259 Minn. 427, 107 N.W.2d 864 (1961).

⁹⁶ *Lauterbeck v. Lauterbeck*, 392 P.2d 24 (Alaska 1964).

⁹⁷ See note 44 *supra*.